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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931.

No. [redacted] 10

UNITED STATES OF AMERICA, *ex rel.* LEO STAPF,
*Petitioner,*

*v.*

EDWARD CORSI, Commissioner of Immigration at the Port of New York.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S SUGGESTION OF ABATEMENT.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1931.

No. 739.

UNITED STATES OF AMERICA *ex rel.*
LEO STAPF,
Petitioner,

*v.*

EDWARD CORSI, Commissioner of Immigration at the Port of New York.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

## PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S SUGGESTION OF ABATEMENT.

The Act of August 18, 1894 (28 Stat. 391, 8 U. S. C. 107), authorizing appointment of Commissioners of Immigration, provides:

> "Section 1. The Commissioners of immigration at the several ports shall be appointed by the President, by and with the advice and consent of the Senate, to hold their offices for the term of four years, unless sooner removed, *and until their successors are appointed;* and nominations for such offices shall be made to the Senate by the President as soon as practicable after the passage of this act" (our italics).

Respondent's suggestion of abatement fails to state whether Day was "removed" for cause, or resigned. In either event his separation from office could not have become effective until his successor was appointed, *Smoot* v. *Somerville,* 59 Md. 84, 95; *State* v. *Murphy,* 13 South 705, 708, 32 Fla. 138; the object of employing such language being to prevent the occurrence of a vacancy, hiatus or interregnum between the day of the termination of incumbent's tenure of office and the day of the successor's entry upon his duties.

Respondent, at page 2, states:

> "We are advised by the Department of Labor that Day ceased to hold the office of Commissioner on September 10, 1931. On August 17, 1931, Irving F. Wixom became Acting Commissioner (Day being on leave after that date), and served as such through October 31, 1931. The present Commissioner, Edward Corsi, took office on November 1, 1931, under a recess appointment, signed October 10, 1931. He was nominated for the position on December 14, 1931, and was confirmed on December 21, 1931. Following this confirmation a commission dated December 21, 1931, was signed on December 30, 1931."

Section 178 R. S., 5 U. S. C. 5, provides:

> "*Sec. 5. Vacancies in subordinate offices.*
>
> In case of the death, resignation, absence, or sickness of the chief of any bureau, or of any officer thereof, whose appointment is not vested in the head of the department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such bureau, shall, unless otherwise directed by the President, as provided by section 6 of this title, perform the duties of such chief or of

such officer until a successor is appointed or such absence or sickness shall cease."

We are informed and believe that on August 17, 1931, and at all relevant times subsequent thereto, Irving F. Wixon was Chief Supervisor of Immigration under the direction of the Commissioner General of Immigration at Washington, that he at no time was an assistant or deputy of Day, that he at none of said times was Chief Clerk of the Bureau of Immigration and that at no time did the President direct his appointment to fill the office of Commissioner of Immigration at the Port of New York, nor could the President have done so in view of Section 179 R. S., 8 U. S. C. 6, which limits his power to filling a vacancy of the type involved with an officer "whose appointment is vested in the President, by and with the advice and consent of the Senate," and Wixon was not such an officer. See 28 Op. Atty. Gen. 95; *State ex rel. Vanderveer* v. *Gormley,* 102 Pac. 435, 438.

Therefore, as a matter of law, Day continued to hold office, even though on leave of absence, at least until the happening of the first legal act in the premises that could possibly relieve him from duty, namely, the President's recess appointment of his successor, Edward Corsi, as Commissioner on October 10, 1931, or, possibly, until Corsi's entry upon the performance of his duties on November 1, 1931.

However, it is immaterial whether the date was October 10th, 1931, or November 1, 1931, because the prescribed period of six months has not elapsed since either of said dates.

**Respondent and the Court Below Permitted Proceeding to Continue Without Objection.**

Sub-sections (a) and (c) of Section 11 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941 (28 U. S. C. 780), provides:

> "SEC. 11. (a) That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.
> * * *
>
> (c) Before a substitution under this section is made the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have."

It would seem from the language of the foregoing section that the action abates in the Court in which it is pending at

the time the officer ceases to hold office unless within six months, substantial need appearing therefor, said Court "permits" it to continue. There is nothing in said section providing for the formal making, entering and/or filing of an order of substitution.

An examination of the copies of the transcript of record on file in this Honorable Court will show that they bear the official stamp of the Clerk of the Circuit Court of Appeals, Second Circuit, as having been filed therein on November 19, 1931, and that their covers bear the title "United States of America, *ex rel.*, Leo Stapf, Relator-Appellant, against Edward Corsi, Commissioner of Immigration at the Port of New York, Respondent-Appellee", said Corsi having commenced the performance of his duties nineteen days prior to such filing. Said Corsi was represented by the United States Attorney for the Southern District of New York, upon whom three copies of said transcript of record, bound in said covers, were served. Thereafter briefs were filed on or about January 11, 1932, and oral argument was had before the Circuit Court of Appeals in which the United States Attorney participated. Thereupon said Court made an order affirming the judgment of the District Court and in due course its mandate went down to the District Court. At no time during the proceedings did the respondent or his representative, the United States Attorney, raise any objection to the continuance of the proceeding, nor did the Circuit Court of Appeals for the Second Circuit, the Court in which it was pending during Day's leave of absence, terminate the same as having abated.

The petition for writ of certiorari was filed in this Honorable Court February 29, 1932, fully ten days before

the proceeding would have abated even had Day's tenure of office terminated on September 10, 1931.

For all of the above reasons it is respectfully submitted that it would seem that the Circuit Court of Appeals and respondent "permitted" the proceeding to continue, but, if our construction of the law on this point is erroneous, the six months' period not having expired, as set forth in our first point, we respectfully ask this Honorable Court to grant permission for it to continue, in view of the fact that there is a substantial need for such continuance, the question involved being a very important and general one, which affects thousands of persons who honestly, and, in many cases by encouragement from American officers, entered the United States irregularly and are immune from deportation unless a round trip voyage from and back to an American port as a seaman of the United States tolled the statute of limitations.

Respectfully submitted,

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New York City.

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No. [redacted] 10

# In the Supreme Court of the United States

OCTOBER TERM, 1931

UNITED STATES OF AMERICA EX REL. LEO STAPF,
PETITIONER

*v.*

EDWARD CORSI, COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## SUGGESTION OF ABATEMENT

# In the Supreme Court of the United States

OCTOBER TERM, 1931

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No. 739

UNITED STATES OF AMERICA EX REL. LEO STAPF, petitioner

*v.*

EDWARD CORSI, COMMISSIONER OF IMMIGRATION AT the Port of New York

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**SUGGESTION OF ABATEMENT**

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Comes now the Solicitor General and suggests to the Court that this action has abated.

This suit was commenced by the filing of a petition for a writ of *habeas corpus* (R. 4–5) in the United States District Court for the Southern District of New York. The writ was allowed on June 2, 1931. (R. 2–3.) In the petition and in the writ Benjamin M. Day, Commissioner of Immigration, was named as respondent. (R. 1, 2, 4.) Day filed

his return to the writ (R. 7–31) on June 22, 1931 (R. 1). On June 23, 1931, an order dismissing the writ was entered. (R. 32.) On the same day an appeal to the Circuit Court of Appeals for the Second Circuit was allowed. (R. 34.) On January 11, 1932, the Circuit Court of Appeals entered an order affirming the judgment of the District Court. (R. 41–42.) The case is now pending in this Court on a petition for a writ of certiorari filed February 29, 1932.

We are advised by the Department of Labor that Day ceased to hold the office of Commissioner on September 10, 1931. On August 17, 1931, Irving F. Wixom became Acting Commissioner (Day being on leave after that date), and served as such through October 31, 1931. The present Commissioner, Edward Corsi, took office on November 1, 1931, under a recess appointment, signed October 10, 1931. He was nominated for the position on December 14, 1931, and was confirmed on December 21, 1931. Following this confirmation a commission dated December 21, 1931, was signed on December 30, 1931.

The record shows no substitution of any party defendant, and we are informed by the Clerk of the Circuit Court of Appeals for the Second Circuit that no order substituting either Wixom or Corsi for Day has been entered in that court and that the docket of the District Court Clerk's office does not show that any order of substitution was entered in the District Court.

It is therefore evident that under Section 11 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941 (U. S. C., Title 28, Sec. 780) the time for substituting Corsi as the defendant expired not later than March 10, 1932, since Section 11 (a) permits the continuance of an action against the successor in office only where a satisfactory showing of the need for such continuance is made "within six months after [the predecessor's] death or separation from the office."

The decisions of this Court are unanimous in holding that no substitution may be made after the period provided in Section 11 (a), and that the failure to substitute within that time requires the abatement of the action. See *LeCrone* v. *McAdoo*, 253 U. S. 217, 219; *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590, 591; *Matheus* v. *United States ex rel. Cunningham*, 282 U. S. 532.

Respectfully submitted.

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MARCH, 1932.

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